Supreme Court, U.S.
FILED
MAY 21 1997
OFFICE OF THE CLERK

(6)

NO. 96-1494

IN THE

Supreme Court of the United States

October Term, 1997

ALCAN ALUMINUM CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF ON NEW AUTHORITY

Lawrence A. Salibra, II
Counsel of Record
Alcan Aluminum Corporation
6060 Parkland Boulevard
Mayfield Heights, OH 44124-4185
(216) 423-6918

Attorney for Petitioner
Alcan Aluminum Corporation

10 PM

ARGUMENT

On March 14, 1997, Alcan Aluminum Corporation filed a petition with this Court requesting a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, seeking the resolution of pivotal issues of CERCLA liability. Alcan's petition asserted, *inter alia*, a clear conflict between the First and Eighth Circuits on the one hand and the Second and Third Circuits on the other, as to whether a CERCLA plaintiff must demonstrate a causal connection between a defendant's waste and the incurrence of response costs as a predicate to § 107(a) liability. On April 21, 1997, the Court of Appeals for the Fifth Circuit sided with the position taken by the First and Eighth Circuits in *Licciardi v. Murphy Oil USA, Inc.*, No. 96-30202, 1997 U.S. App. LEXIS 7920, printed in the Appendix at A-1. Because *Licciardi* sharply conflicts with the Third Circuit's decision in this case, and exacerbates the conflict among the circuits regarding CERCLA causation, we call it to the Court's attention in this Supplemental Brief.

As we noted in our petition, in *Dedham Water Co. v. Cumberland Farms Dairy*, 889 F.2d 1146 (1st Cir. 1989) and *Farmland Indus. v. Morrison-Quirk Grain Corp.*, 987 F.2d 1335, 1340 (8th Cir. 1993), the First and Eighth Circuits respectively concluded that a prerequisite to CERCLA liability was that the plaintiff demonstrate a causal connection between the CERCLA hazardous substances and the response costs. The Second and Third Circuits, however, do not require a causal connection between the CERCLA hazardous substances and the response costs because they believe that the plaintiff's burden of proof would be too difficult. *See United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 721 (2d Cir. 1993) and

United States v. Alcan Aluminum Corp., 964 F.2d 252, 265 (3d Cir. 1991) (the present case).

In *Licciardi*, the Fifth Circuit joined the First and Eighth Circuits by requiring a showing of causation between the CERCLA hazardous substances and the response costs as a prerequisite to CERCLA liability. The Fifth Circuit's decision in *Licciardi* is in irreconcilable conflict with the decision of the Third Circuit in the present case, which imposed joint and several liability on Alcan for the release of *below* background metal compounds notwithstanding the fact that the undisputed evidence established that there were no metal problems of any kind at the Butler Tunnel site and there were no CERCLA hazardous substances in the Alcan Emulsion which were identified as a basis for a CERCLA response action.

Licciardi is particularly relevant to the present petition because it involved lead, one of the same elemental metals contained in the Emulsion. Like the lead in the Emulsion--in fact, like all of the metal compounds in the Emulsion--the lead in *Licciardi* did not breach the toxic concentration leaching procedure ("TCLP") standard. As the Fifth Circuit pointed out, EPA does not consider such metal hazardous because it is not capable of leaching out of the soil. *Id.* at *5. Moreover, the lead level in the Emulsion was far *below* background levels, whereas the lead level in *Licciardi* was *above* background levels. *Id.* at *6.

The district court in *Licciardi* had imposed CERCLA liability on the defendant in the same manner that the Third Circuit imposed liability on Alcan--exclusively based on that fact that hazardous substances were released without any proof that the

release did or could cause response costs. The district court in *Licciardi* concluded that liability could be imposed under CERCLA provided there was a release of hazardous substances above background levels.[1] *Id.* at *4.

The Fifth Circuit reversed. It effectively rejected the view of the Second and Third Circuits that the causation element of CERCLA § 107(a) simply relates to causation of a *release* and not to causation of response costs. The Fifth Circuit also refused to adopt the position of the Second and Third Circuits that liability automatically attaches to the release of any amount of hazardous substances:

> While *Amoco [Oil Co. v. Borden, Inc.]* allows a CERCLA plaintiff to prove that response costs were caused by a release without resort to an applicable standard of justification, bare proof that there was a release is not enough; as we have explained, liability does not attach to the release of 'any quantity of a hazardous substance.'

Id. at *6 *quoting Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 670-71 (5th Cir. 1989). The Fifth Circuit opined that the hazardous substances released must pose a "threat to the public or the environment." *Id.* Noting that the defendant's lead was not TCLP toxic and that no expert had attempted to link the lead with groundwater tests that demonstrated contamination,

---

[1]Even the district court appears to have limited its imposition of liability to the release of above background hazardous substances, whereas the Second and Third Circuits would impose CERCLA liability for the disposal of a substance like garden soil containing metal compounds at background levels.

the Fifth Circuit concluded that the plaintiffs had not made a prima facie case for liability. *Id.* at *5-6. Hence, the *Licciardi* decision tips the balance in favor of Alcan on this fundamental issue and we ask that the Court give it due consideration.

CONCLUSION

For all of the reasons contained in this Supplemental Brief as well as the reasons contained in the Petition of Writ of Certiorari, Petitioner Alcan Aluminum Corporation respectfully requests that this Honorable Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

Lawrence Anthony Salibra, II
Counsel of Record
Alcan Aluminum Corporation
6060 Parkland Boulevard
Mayfield Heights, OH 44124-4185
(216) 423-6918

Attorney for Petitioner
Alcan Aluminum Corporation

JAMES J LICCIARDI; AGATHA LICCIARDI SPERA; MARY ANN DISALVO LICCIARDI, wife of James J. Licciardi; MARY ANN LICCIARDI NAVO, wife of and; BENJAMIN NAVO,
Plaintiffs-Appellants-Cross-Appellees,

v.

MURPHY OIL USA INC.,
Defendant-Appellee-Cross-Appellant.

No. 96-30202

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

1997 U.S. App. LEXIS 7920

April 21, 1997, Decided

PRIOR HISTORY: [*1] Appeal from the United States District Court for the Eastern District of Louisiana. 93-CV-490-N. Edith Brown Clement, U.S. District Judge.

DISPOSITION: REVERSED.

COUNSEL: For AGATHA LICCARDI SPERA, BENJAMIN NAVO, JAMES J LICCIARDI, MARY ANN DISALVO LICCIARDI, wife of James J Licciardi, MARY ANN LICCIARDI NAVO, wife of and Plaintiffs-Appellants-Cross-Appellees: Michael A Fenasci, New Orleans, LA. Manuel A Fernandez, New Orleans, LA.

For MURPHY OIL USA INC, Murphy Oil USA Incorporated, Defendant-Appellee-Cross-Appellant: James F Shuey, Frilot, Partridge, Kohnke & Clements, New Orleans, LA. George A Frilot, III, Robert Beattie McNeal, Frilot, Partridge, Kohnke and Clements, New Orleans, LA.

JUDGES: Before HIGGINBOTHAM, SMITH, and BARKSDALE, Circuit Judges.

OPINION: PER CURIAM:

I

From 1991 through 1993, the Licciardis hired a number of environmental testing and consulting firms to take and test environmental samples from their property located adjacent to Murphy Oil's Meraux refinery in Louisiana. Armed with results of these tests, the Licciardis filed suit under § 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607, alleging that the samples demonstrate that Murphy contaminated their property with leaded tank bottoms and refinery sludge in violation of environmental law.[1]

[*2]

The bench trial was bifurcated into liability and damages phases. Following the liability phase, the district court entered its findings. The court found that a certain "black tarry substance" from a sample taken from the Licciardis' property came from Murphy's refinery, finding that the level of lead concentration in the soil at the testing site exceeded background levels. The court held that defendant's release of the substance caused plaintiffs' response costs. The district court observed that the "presence of any hazardous substances [above background levels] on plaintiffs' property is sufficient to justify their incurring response costs." After ordering briefs from the parties on

---

[1]The Licciardis also made certain state law claims in their complaint. The district court was unable to find sufficient support for these state-law lost profit claims, and decided that portion of the case for Murphy. The Licciardis have not appealed, so we do not revisit that decision here.

damages, the trial court awarded the Licciardis $12,337, the amount which Murphy stipulated to as the Licciardis' expense for testing for substances defined as "hazardous" under CERCLA. Both sides appeal. Murphy contests any finding of liability while the Licciardis assert that all of their expenses on sampling and testing should have been awarded as damages.

II

There are four elements to a CERCLA cost-recovery action, such as the one here: (1) the site must be a "facility" under § 9609(9); (2) [*3] the defendant must be a "responsible person" under § 9607(a); (3) a release or threatened release of a hazardous substance must have occurred; and (4) the release or threatened release must have caused the plaintiff to incur response costs. *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir. 1989). The first and second of these elements are not in issue here. Murphy is a "responsible person" and its refinery is a "facility." The district court correctly noted that lead is a "hazardous substance" under 40 C.F.R. § 302.4.

In Amoco, we rejected the proposition that CERCLA "liability attaches upon release of any quantity of a hazardous substance." 889 F.2d at 670 (emphasis original). We explained that the question of whether a release has "caused" or justified response costs is tempered by the purpose of the Act. Id. Although we acknowledged that it is "not the exclusive means of justifying response costs, [ ] a plaintiff who has incurred response costs meets the liability requirement as a matter of law if it is shown that any release violates . . . any applicable state or federal standard, including the most stringent." Id. at 671 (emphasis original). [*4] However, the district court's reliance upon a violation of a standard and Amoco was misplaced, as we will explain.

The district court concluded that any lead found in the sample "exceeding background levels" constituted a release that caused the Licciardis' response costs under CERCLA if the lead came from Murphy's refinery. Although the district court did not specify, the record reflects that its reference to "background levels" refers to the 1984 U.S. Geological Survey.

The U.S. Geological Survey measures empirical evidence relating certain topological and geological facts for a point on the globe. It is not a legal standard. We are aware of no environmental law, state or federal, that establishes the U.S. Geological Survey "background level" as a standard, requirement, or criterion. Relatedly, it is not clear that the Survey figure used by the district court was relevant; according to an expert who testified at trial, the "background level" relied upon by the district court was established "30 to 50 miles away from the Meraux refinery."

The trial court also considered the drinking water standard and the toxic concentration leaching procedure (or "TCLP") standard. According [*5] to plaintiffs' expert, the drinking water standard establishes a legally acceptable limit for lead "at the tap," but none of the experts at trial attempted to link the standard to groundwater tests. Moreover, plaintiffs' expert admitted at trial that she had not carried out any groundwater testing, and that there was insufficient data to form any opinion that the Licciardis' property had been affected by groundwater migration from the refinery. As for the TCLP standard, plaintiffs' expert explained that even if a material contains lead, EPA does not consider it "hazardous" unless the lead is capable of "leaching" out of the material. The TCLP standard, she explained, is an extraction procedure under which a scientist simulates a landfill environment with rainfall and acidity controls, then tests for lead in the resulting

leachate. Plaintiffs admitted in their Supplemental Post-Trial Memorandum that the "TCLP analysis was below regulatory levels." Thus, even though they have expended significant effort and resources testing their property and hiring experts, plaintiffs have been unable to offer any evidence that any regulatory standard has been breached.

Without the Geological Survey, [*6] the drinking water standard, or the TCLP standard as possible bases for finding that Murphy's release caused response costs, we ask whether, in the absence of any other evidence, a finding of hazardous substance "above background levels" is sufficient to support a finding that the release caused response costs. As we explained in Amoco, responsible parties are not liable unless there is evidence that they "posed [a] threat to the public or the environment." While *Amoco* allows a CERCLA plaintiff to prove that response costs were caused by a release without resort to an applicable legal standard of justification, bare proof that there was a release is not enough; as we have explained, liability does not attach to the release of "any quantity of a hazardous substance." Id. at 670-71. "The question of whether a release has caused the incurrence of response costs should rest upon a factual inquiry into the circumstances of a case and the relevant factual inquiry should focus on whether the particular hazard justified any response actions." Id. at 670. We have been pointed to no evidence that the found "release" justified the response costs. We cannot sustain the district [*7] court's finding of liability.

We do not reach the issues regarding the proper calculation of damages under CERCLA.

REVERSED.